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No. 75-775

In the Supreme Court of the United States

OCTOBER TERM, 1975

MILTON J. SHAPP, GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA, ET AL., PETITIONERS

v.

FRANK G. ZARB, ADMINISTRATOR OF THE FEDERAL ENERGY ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioners brought this action to contest an allegedly improper federal allocation of gasoline for delivery into Pennsylvania for March 1974. The district court dismissed the complaint for lack of standing, but the Temporary Emergency Court of Appeals vacated the district court's order and remanded with directions to dismiss the complaint as moot. Petitioners now contend that the case is not moot and that they have standing.

1. On March 20, 1974, petitioners brought this action for injunctive relief, alleging that in March 1974, during the fuel shortage induced by the Arab oil boycott, retail gasoline service stations in Pennsylvania received less than their proper share of gasoline. Petitioners attributed this in part to what they asserted was an incorrect allo-

cation formula used by the Federal Energy Administration (Pet. App. 7a-13a) and in part to the actions of gasoline wholesalers and refiners.

After an initial remand by the court of appeals[1] (Pet. App. 44a-48a; 510 F.2d 379), the district court dismissed the action on the ground that petitioners lacked standing. The court held that petitioners had not made "a showing of particularized harm" to themselves (Pet. App. 53a-56a) and that the case was not ripe for adjudication because petitioners had not exhausted the administrative remedies provided by federal regulations (Pet. App. 56a-57a).

The court of appeals vacated this judgment, holding that the controversy had become moot by virtue of the expiration of the Emergency Petroleum Allocation Act of 1973 (87 Stat. 627, 15 U.S.C. (Supp. III) 751 *et seq.*), the statutory authority for the program of federal control and allocation of petroleum (Pet. App. 63a-64a).[2] After Congress extended the Allocation Act through November 15, 1975,[3] petitioners requested the court to reconsider its decision. On October 30, 1975, the court denied this request (Pet. App. 65a).

On December 22, 1975, Congress enacted the Energy Policy and Conservation Act, Pub. L. 94-163, 89 Stat. 871, which amended the Emergency Petroleum Allocation Act and extended it as amended through September 30, 1981.

2. Petitioners contend that this case presents important

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[1]The district court had certified to the court of appeals the issue of standing (Pet. App. 32a-41a), but the court of appeals remanded the case to the district court to determine whether petitioners were injured within the meaning of the pertinent statute (Pet. App. 44a-48a).

[2]The Act had been extended to August 31, 1975, by Pub. L. 93-511, 88 Stat. 1608, 15 U.S.C. (Supp. IV) 753(g)(1).

[3]Pub. L. 94-99, 89 Stat. 481. The Allocation Act was extended to December 15, 1975, by Pub. L. 94-133, 89 Stat. 694.

questions concerning the standing of a State and its officers to sue the federal government "for the violation of federal statutes and regulations committed by a federal agency" (Pet. 10). But the court of appeals held that "supervening mootness prevents us from reviewing the issue of standing" (Pet. App. 63a). Thus, the only question presented is whether this case is moot. That question does not warrant review by this Court.

a. Petitioners' principal claim is that the Federal Energy Administration used erroneous data to calculate the allocation formula for determining the amount of petroleum to be delivered to retail gasoline service stations in Pennsylvania during March 1974 (Pet. App. 10a-13a). Petitioners sought an injunction requiring the Administration to recalculate the allocation formula using other data and directing respondent oil companies to deliver to their Pennsylvania customers "that additional amount of motor gasoline which this Court finds to be the amount Pennsylvania should have received, by law, in March, 1974" (Pet. App. 17a).

But the allocation program in effect during the spring of 1974 operated month-by-month; a new allocation formula was determined each month, based upon the petroleum available and a new base month (10 C.F.R. Part 211 (1974)). The petroleum allocated to Pennsylvania in March 1974 was sold to the public during that month. To order more gasoline to be allocated to Pennsylvania now would not meaningfully compensate Pennsylvania's residents for any injury caused by a shortage of gasoline during March 1974. Current allocations, which are based on current supply, are greater than current petroleum consumption. There is therefore no equitable basis for the injunctive relief petitioners request, and the case is moot.

While the Federal Energy Administration retains authority to allocate petroleum, the statutory provisions governing the exercise of that authority have changed since March 1974.[4] The regulatory framework, too, has changed. The Administration has recognized that its allocation practices initially misallocated gasoline, a problem caused in large measure because "the governing statute demanded immediate and extensive regulation of a new and complex area." *Mandel* v. *Simon*, 493 F.2d 1239, 1240 (T.E.C.A.). In *Mandel* v. *Simon* the court recognized that the Administration is "in good faith attempting to correct these inequities as promptly as they are discovered" (493 F.2d at 1240). Since the initial period of allocation, the regulations and practices have been modified and refined many times over, and the system of data collection has been significantly improved. See 10 C.F.R. Part 211 (1975).

The current allocation program is authorized by the Energy Policy and Conservation Act, *supra*, enacted on December 22, 1975, and many regulations may be changed pursuant to that Act. See note 4, *supra*. Thus, even if there were merit in petitioner's claim that March 1974 allocation to Pennsylvania under the Allocation Act was erroneous, that claim would lack sufficient immediacy to establish a presently existing controversy. See *Weinstein* v. *Bradford*, No. 74-1287, vacated as moot, December 10,

[4]Section 454 of the Energy Policy and Conservation Act (89 Stat. 950) requires the Administration to initiate a series of rulemaking proceedings, to make such changes in the allocation rules as the Administration finds warranted in light of those proceedings, and to submit a report to Congress. Petitioners are free to participate in those proceedings and to suggest changes designed to rectify the inequities they now perceive. See also H.R. Conf. Rep. No. 94-700, 94th Cong., 1st Sess. (1975), and S. Rep. No. 94-26, 94th Cong., 1st Sess. (1975), which describe other changes made by Title IV of the Energy Policy and Conservation Act.

1975; *North Carolina* v. *Rice*, 404 U.S. 244, 246; *Preiser* v. *Newkirk*, 422 U.S. 395, 401-403; *DeFunis* v. *Odegaard*, 416 U.S. 312.

b. The alterations in the statutory and regulatory scheme also moot petitioners' claims concerning the pricing, inventory, and reporting regulations. Those claims arose during the first months of administration of the allocation program. See *Mandel* v. *Simon*, *supra*. All of those regulations have been replaced. The Federal Energy Administration is currently engaged in a review of its entire allocation program pursuant to the Energy Policy and Conservation Act.

Petitioners contend that they may be aggrieved by future actions of the Administration, pursuant to the new statute and regulatory scheme. This claim is plainly premature, and in any event is outside the scope of petitioners' complaint. Section 523(a)(4) of the Energy Policy and Conservation Act (89 Stat. 962-963) provides that the Administration shall make necessary adjustments in its program, or grant exceptions to particular individuals, consistent with other purposes of the law, "to prevent special hardship, inequity, or an unfair distribution of burdens". Petitioners have failed to exhaust the administrative remedy that the new Act thus affords for any grievances that they may now have or that they may acquire.[5]

[5]See also the Federal Energy Administration Act of 1974, 88 Stat. 102, 15 U.S.C. (Supp. IV) 766(i)(1)(D), which establishes a similar administrative relief provision covering all of the Administration's regulations. This provision became effective in May 1974, after the instant suit had been commenced. See 10 C.F.R. Part 205.

If petitioners exhaust their administrative remedies, Section 523(b) of the new Act (89 Stat. 963) affords them ample opportunity for judicial review. Contrary to petitioners' claim that issues of improper allocation are "capable of repetition, and evading review" (Pet. 10), claims properly brought under such provisions have been reviewed with exemplary dispatch, consistent with the short duration of the programs involved.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[6]For example, in *Mandel* v. *Simon, supra,* the complaint was filed on February 20, 1974; the district court issued a preliminary injunction on the same day; the court of appeals stayed the injunction later that day, heard oral argument on February 26, and upheld the allocation program on February 27, 1974.